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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1943

No. 134

JOHN THOMAS CARTER AND EUGENE PEARSON MACEMORE, APPELLANTS,

vs.

THE COMMONWEALTH OF VIRGINIA

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

FILED JULY 1, 1943.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 15, 1943.

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[fol. 1]

IN THE SUPREME COURT OF APPEALS OF VIRGINIA, AT RICHMOND

JOHN THOMAS CARTER and EUGENE PEARSON MACEMORE, Plaintiffs in Error,

versus

THE COMMONWEALTH OF VIRGINIA, Defendant in Error

Petition for a Writ of Error.

To the Honorable Chief Justice and Justices of the Supreme Court of Appeals of Virginia:

Your petitioners, John Thomas Carter and Eugene Pearson Macemore, respectfully represent that they are aggrieved by final judgments of the Circuit Court of Rappahannock County, entered September 14, 1942, whereby petitioners were convicted on a warrant issued by M. A. Compton, Justice of the Peace, on May 20, 1942, which said warrant charged petitioners with the violation of the provisions of Section 49-a of the Alcoholic Beverage Control Act of Virginia and Sections 42 and 44 of a Regulation of the Virginia Alcoholic Beverage Control Board, known as Order No. A-1, adopted August 30, 1940; in that they "did transport more than one gallon of alcoholic beverages, namely, 56 cases, containing 168 gallons of whiskey, from a point in the State of Maryland within and into the State of Virginia and in Rappahannock County, Virginia, without having posted with the Virginia Alcoholic Beverage Control Board a bond with approved surety, as required by law; and,

[fol. 2] "Further, that the bill of lading or other memorandum of shipment did not specify the route to be traveled by such vehicle while in Virginia; and,

"Further, the consignee shown on the bill of lading or other memorandum of shipment was a person who did not have a legal right to receive such alcoholic beverages at the point of destination shown on the bill of lading or other memorandum of shipment, namely, R. M. Williard, T/A Eagle Distilling Company, Route 1, Thomasville, North Carolina."

A transcript of the record of the case accompanies this petition and, for convenience, we shall hereafter refer to the portions thereof containing the various pleadings and facts of the case.

The Facts

The case was tried upon an agreed stipulation of facts which was incorporated as a part of the record in the bill of exceptions (R., pp. 11-14).

Briefly summarized the facts are these. On May 20, 1942, petitioners received from a wholesale liquor dealer in Dorsey, Maryland, a shipment of whiskey for the account of a consignee in Thomasville, North Carolina. The whiskey was loaded onto a truck which was driven into Virginia by petitioners who intended to transport the whiskey through Virginia into North Carolina, but they were apprehended and arrested in Rappahannock County.

When apprehended petitioners produced a bill of lading showing the correct amount of whiskey contained in the shipment. The bill of lading disclosed the consignee to be a resident of Thomasville, North Carolina. Under the laws of North Carolina this consignee could not lawfully receive the whiskey at its destination. The bill of lading contained no routeing for the truck to follow while in Virginia.

The truck was registered in the name of Healton Miller, a resident of North Carolina, who had posted bond with approved surety as required under a regulation of the Virginia Alcoholic Beverage Control Board, but the Board had previously notified Miller that the bond had been cancelled upon information that he had the reputation of being a bootlegger in North Carolina. There was no evidence that Miller had ever violated the laws of Virginia

[fol. 3] **The Pleadings**

The case was set for hearing in the Circuit Court of Rappahannock County on July 13, 1942, on the aforementioned warrant. On that day the petitioners appeared in open court and entered their pleas of not guilty to the charges contained in the warrant, waived jury trial and consented to be tried jointly by the Judge. Petitioners and the Commonwealth then submitted to the Judge an agreed stipulation of all of the facts of the case (R., p. 8).

Thereafter the petitioners moved the court to strike out all of the evidence and to dismiss the warrant on five

grounds assigned, which motion was overruled and to which ruling petitioners excepted on the grounds stated. (Bill of Exceptions, R., pp. 14-16.)

On September 14, 1942, the court entered judgment against petitioners finding them both guilty of the charges contained in the warrant and fixing their punishment, to which judgment the petitioners excepted (R., p. 9).

Thereafter the petitioners moved the court for a new trial on the same five grounds assigned in their previous motion to strike out all of the evidence and to dismiss the warrant, which motion was overruled and to which ruling the petitioners excepted on the grounds stated (Bill of Exceptions, R., p. 16).

On September 28, 1942, on motion of petitioners execution of the judgment was stayed for ninety days pending the presenting of this petition (R., p. 10).

A bill of exceptions was granted the petitioners by the court on September 28, 1942 (R., pp. 10-16).

Assignments of Error

Petitioners assign as error the rulings of the court below in overruling their motion to strike out all of the evidence and to dismiss the warrant; in entering final judgment against them; and in overruling their motion for a new trial. The grounds of the motions and the objection to the judgment were identical and, therefore, in order to avoid obviously unnecessary repetition we shall state our assignments of error as one assignment. (In this assignment of error and our argument we have changed the order of the grounds stated in our motions before the court below in order to present a more logical and convenient sequence.)

The Court below erred in overruling petitioners' motion to strike out all of the evidence and dismiss the warrant, in [fol. 4] entering final judgment against petitioners, and in overruling petitioners' motion for a new trial on the grounds that the act of the Virginia Legislature and the Rules and Regulations of the Virginia Alcoholic Beverage Control Board made pursuant thereto which petitioners were charged with violating were unconstitutional and void, in the following particulars, namely:—

(1) That said Act is unconstitutional insofar that it confers upon said Board the power to make said regulations, in that it violates Article III of the Constitution of Virginia

in attempting to delegate to said Board purely legislative powers and functions.

(2) That under the provisions of Section 5 and Section 49-a of the Alcoholic Beverage Control Act, Chapter 94 of Acts of the General Assembly of Virginia of 1934, as amended, Virginia Code Section 4675 (49-a) there was no authority delegated to make such regulations as Sections 42 and 44 of regulations of the Virginia Alcoholic Beverage Control Board, known as Order Number A-1, adopted August 30, 1940, in that such regulations were not within the scope of the powers delegated to said Board under said Act.

(3) That said Act and said Regulations are unconstitutional in that they violate Article I, Section 8, Clause 3 of the Constitution of the United States regulating commerce between the States and/or imposing a burden upon interstate commerce.

(4) That the cancellation of the bond of Healton Miller on May 1, 1942, by the said Board was a discriminatory action and was unlawful and without authortiy under the provisions of said Act and said Regulations.

(5) That the cancellation of the bond of Healton Miller on May 1, 1942, by the said Board was unlawful and violative of the defendants' rights under the provisions of Article I, Section 8, Clause 3 of the Constitution of the United States.

Argument

We shall sub-divide our argument under the five grounds assigned in our assignment of error above.

For convenience, Section 5 and Section 49-a of the Alcoholic Beverage Control Act and Sections 42 and 44 of the Regulations of the Alcoholic Beverage Control Board are set out verbatim in the appendix to this petition.

[fol. 5] I

Are the Acts of Assembly purporting to delegate the right to make rules and regulations constitutional and valid?

This question of the validity of delegation of the rule-making power is an exceedingly important one and is by no

means free from difficulty. It is conceded that, in this day of increasing complexity of government, it is inevitable that administrative agencies and bureaus must increase in number and in importance; but neither convenience nor the exigencies of the occasion should be permitted to undermine the constitutional principles upon which the Commonwealth was established, and of those principles none is more basic than the absolute separation of executive, legislative, and judicial duties and functions in accordance with Article III of the Constitution of Virginia. "The legislative power of the State shall be vested in a general assembly. * * *" The assembly is charged with the power and duty of making the laws for the state without the right to divest itself of this function or delegate it to executive or administrative officers; subject only to the qualification, if it is a qualification, that the legislature having fixed the policy and the legal principles and standards, it may properly delegate to administrative agencies the duty of finding the fact to which those principles shall apply and some discretion in applying those principles to mere matters of detail within the policy or principle enunciated.

This principle has been jealously guarded by this Court as is evidenced by recent decisions on the subject.

In *Thompson* v. *Smith*, 155 Va. 367, an ordinance of the City of Lynchburg provided that "The Chief of Police is authorized and directed to revoke the permit of any driver (automobile) who, in his opinion, becomes unfit to drive an automobile on the streets of the city". The validity of this ordinances was attacked on the ground that it was an improper delegation of legislative power and in holding the ordinance invalid this Court, through Mr. Justice Epes, said—

"It is a fundamental principle of our system of government that the rights of men are to be determined by the law itself, and not by the let or leave of administrative officers or bureaus. This principle ought not to be surrendered for convenience or in effect nullified for the sake of expediency. It is the prerogative and function of the legislative branch of the government, whether State or municipal, to determine and declare what the law shall be and the legislative [fol. 6] branch of the government may not divest itself of this function or delegate it to executive or administrative officers."

* * * * * * *

"In principle, legislation and administration are quite distinct powers; but in practical application the line which separates their exercise is not clearly marked or easily defined. However, in their definition in practical application lies the difference between government by legislation and government by bureaucracy, which, though contrary to the genius of our government, some courts have gone far towards sustaining."

* * * * * * *

"Mere matters of detail within the policy and the legal principles and standards established by the statute or ordinance, may properly be left to administrative discretion, for the determination of such matters of detail is more essentially ministerial than legislative. In declaring the policy of the law and fixing the legal principles and standards which are to control in the administration of the law, general terms, which gets precision from the technical knowledge or sense and experience of men and thereby become reasonably certain, may be used; and an administrative officer or bureau may be invested with the power to ascertain and determine whether the qualifications, facts or conditions comprehended in and required by such general terms exist, and whether the provisions of the law so fixed and declared have been complied with in accordance with the generally accepted meaning of the words. *Mutual Film Corp.* v. *Ohio Industrial Commission, supra; Yoe Bow* v. *Cleveland*, 99 Ohio St. 269, 124 N. E. 132, 12 A. L. R. 1424; *Block* v. *Chicago*, 239 Ill. 251, 87 N. E. 1011, 130 Am. St. Rep. 219."

* * * * * * *

"That portion of the ordinance here in question which authorizes the chief of police 'to revoke the permit of any driver, who, in his opinion, becomes unfit to drive an automobile on the streets of the city', fails to declare the policy of the law and fix the legal principles which are to control the discretion of the chief of police in the revocation of licenses in determining what constitutes unfitness to drive an automobile on the streets of the city; and is void because [fol. 7] it delegates powers essentially legislative to an administrative officer."

In *Assaid* v. *Roanoke*, 179 Va. 47, decided January 19, 1942, a license to operate a pool room was revoked by the City Manager of Roanoke under authority of an ordinance which provided—

"The license shall be a personal privilege and shall be granted and transferred only upon the order of the City Manager."

The Court held the ordinance to be invalid and in the course of the opinion by Mr. Chief Justice Campbell, said—

"It must be conceded that, under the police power with which the city is invested, it had the unquestioned power to legally regulate the granting of a license to conduct a pool room, or even to prohibit the operation of a pool room in the city. However, the exercise of the police power must be a valid exercise thereof, and when in its exercise it encounters the barriers erected by the State and Federal Constitutions, it can proceed no further.

"In *Thompson* v. *Smith*, 155 Va. 367, 154 S. E. 579, 71 A. L. R. 604, Mr. Justice Epes said: * * *"

(The language from Justice Epes' opinion which is quoted by us in the first paragraph of our discussion of *Thompson* v. *Smith*, *supra*, is here quoted with approval.)

"It is by this legal tape that the rights of the defendant are to be measured. When the tape is placed upon the ordinance in question, it clearly appears that it violates Article I, Section 11 of the Virginia Constitution and the 14th Amendment to the Constitution of the United States, by reason of its failure to provide for notice and hearing, by undertaking to make the determination of the city manager final and unreviewable, and by not providing for a judicial review thereof.

"If we extend the analysis of the ordinance, it is plain that it arbitrarily empowers the city manager, if he be so inclined, to refuse an ecclesiastic applying for a license to conduct a pool room, and to grant a license to the most notorious criminal in the city. It further empowers the city manager to deny to the one-time gambler the right to show, if he can do so, that he has reformed.

[fol. 8] *"The legality of the ordinance is to be tested not by what has been done under it, but by what may, by its authority, be done.* (Italics supplied.)

"It further appears, from an analysis of the ordinance, that it delegates legislative authority to a ministerial officer. It is true that the law-making body may make a legislative determination under the police power, without notice and hearing to the person affected, *but the legislative body has no power to delegate to a board or an administrative officer its own power to act, without notice and hearing.* This was specifically held in *Thompson* v. *Smith, supra.* (Italics supplied.)

"Our conclusion is that the ordinance under which the defendant was tried and convicted is invalid.

"It follows, therefore, that the judgment of the lower court will be reversed and annulled, and an order will be entered in this court discharging the defendant from further custody."

These principles are by no means novel or restricted to Virginia for the identical doctrines have been enunciated very recently by the Supreme Court of the United States in *Panama Refining Co.* v. *Ryan*, 293 U. S. 388; 79 L. Ed. 446 (The hot oil case), and in *Schecter Poultry Corp.* v. *U. S.*, 295 U. S. 495, 79 L. Ed. 1570 (the "sick chicken" or N. R. A. Case). In both of these cases the Supreme Court of the United States held acts of Congress to be unconstitutional on the ground that attempted delegations of power by Congress to the executive violated the constitutional principles here asserted.

Upon examination of the Virginia Beverage Control Act, we find two sections which may be pertinent—

(1) Section 5, of Chapter 255, of the Acts of 1936, and
(2) Section 49-a of Chapter 255 of the Acts of 1936.

It is believed to be significant that the original Alcoholic Beverage Control Act, Chapter 94 of the Acts of 1934, contained no inhibition against the transportation of alcoholic beverages legally acquired. The only provision on the subject being found in Section 50 which provided that any person not a common carrier who should have, possess * * * or transport alcoholic beverages which are acquired by such person, or any person for whom he is acting, in violation of the provisions of the act shall be guilty of a misdemeanor.

[fol. 9] This Act of 1934, under Section 5 gave the Alcoholic Beverage Control Board the right to make rules and regulations for carrying out the provisions of the act.

In 1936, the original act, which had been prepared by a group of eminent lawyers, was re-enacted with certain changes in phraseology and additions, among which was the addition of Section 49-a, which makes it a misdemeanor to transport alcoholic beverages in violation of rules and regulations of the Board.

As it is conceded in this case that the liquor transported was legally acquired, Section 5 can have no application and the disposition of the case must be governed by Section 49-a of the act of 1936. We here quote the relevant provisions of this section which is now carried in Michie's Code as Section 4675 (49-2):

"The transportation of alcoholic beverages other than wine * * * within, into or through the State of Virginia in quantities in excess of one gallon is prohibited except in accordance with regulations adopted by the Virginia Alcoholic Beverage Board pursuant to this section.

"The Board may adopt such regulations governing the transportation of alcoholic beverages * * * within, into or through the State of Virginia in quantities in excess of one gallon as it may deem necessary to confine such transportation to legitimate purposes and may issue transportation permits in accordance with such regulations.

"Any person who shall transport alcoholic beverages * * * in excess of one gallon in violation of such regulations shall be guilty of a misdemeanor and punished as provided in Section 62 of this act."

As this is the section of the act which prohibits the transportation of alcoholic beverages through Virginia, whether said beverage was acquired legally or illegally it is apparent that here the case against the defendants must rest. And this is recognized in the warrant for the charge in that they "did unlawfully violate the provisions of Section 49-a of the Alcoholic Beverage Control Act of Virginia and Sections 42 and 44 of a regulation of the Virginia Alcoholic Beverage Control Board, known as Order No. A-1, adopted August 30, 1940:—In that they did * * *", etc.

Under Section 49-a the transportation is prohibited "except in accordance with regulations adopted by the Vir-

ginia Alcoholic Beverage Control Board, pursuant to this section". So it is to this section *and this section only* that [fol. 10] we must look for the legislative grant of authority to make rules and regulations which these defendants are charged with violating.

We then come to the gist of the matter—the validity of this provision.

"The board may adopt such regulations governing the transportation of alcoholic beverages * * * within, into and through Virginia in quantities in excess of one gallon *as it may deem necessary* to confine such transportation to *legitimate purposes* and may issue transportation permits in accordance with such regulations." When this provision is measured by the standards laid down by this court as hereinbefore indicated it would seem to be fatally defective. There is no question of fact to be determined by the administrative agency, there is no exercise of discretion as to details with which the legislature might be unable to acquaint itself, there is no clearly defined, legislative policy enunciated. Intoxicating liquor may only be transported in accordance with rules which the board "may deem necessary to confine such transportation to legitimate purposes". Who can say what a board "may deem necessary"? How far can the board go? Shall this board be permitted to adopt the most ridiculous regulations and when questioned reply—"We deemed it necessary. We have been given unrestricted and untrammeled discretion and we have exercised it. We are trying to confine this transportation to 'legitimate purposes'."

Then, who is to say what are legitimate purposes? There is probably no subject upon which there is more disagreement than that of legitimate purpose when that term is applied to intoxicating beverages. It is worthy of note that the act does not use the customary terms such as "lawful" or "purposes permitted by law", but the vague and indefinite word—"legitimate". And if the Board deemed the rule necessary to confine transportation to legitimate purposes it may adopt it and one who violates that rule is guilty of a crime and yet—

"It is a fundamental principle of our system of government that the rights of men are to be determined by the law itself, and not by the let or leave of administrative officers or bureaus. This principle ought not to be sur-

rendered for convenience or in effect nullified for the sake of expediency."

(Justice Epes in *Thompson* v. *Smith, supra*, and with approval by Chief Justice Campbell in *Assaid* v. *Roanoke, supra.*)

[fol. 11] *"The legality of the ordinance is to be tested not by what has been done under it, but by what may, by its authority, be done."*

(Chief Justice Campbell, in *Assaid* v. *Roanoke, supra.*)

Of course, if the section of the statute is invalid the rules adopted pursuant thereto must fall and these defendants have violated no valid law of Virginia.

II

Are the rules and regulations promulgated by the Alcoholic Beverage Control Board proper and valid expressions of the authority purported to be granted under the Acts of Assembly?

The rules with which these defendants are charged with violating are known as Sections 42 and 44 of Order No. A-1 adopted August 30, 1940. These rules may be briefly summarized as follows:

Any person transporting alcoholic beverages within, into or through the State of Virginia shall—

(1) Post with the Board a bond with approved surety in the penalty of $1,000, upon condition that such person will not unlawfully transport or deliver alcoholic beverages within, into or through the State of Virginia, and evidence that the bond has been given must accompany the beverages during transportation.

(2) The beverages must be accompanied by a bill of lading or other memorandum of shipment signed by the consignor showing the description of the beverages, the name and address of the consignor, the name and address of the consignee, the route to be traveled by such vehicle in Virginia, and such route must be the most direct route from the consignor's place of business to the place of business of the consignee.

(3) Vehicles transporting alcoholic beverages shall not vary from the route specified in the bill of lading or other memorandum of shipment.

(4) The name of the consignor shall be the name of the true consignor and such consignor shall only be a person who has a legal right to make such shipment. The name of the consignee shall be the name of the true consignee who has previously authorized in writing the shipment of the [fol. 12] beverages and who has a legal right to receive such beverages at the point of destination shown on the bill of lading.

The warrant in this case (R., p. 1), charges defendant with—(1) Failure to post the bond with approved surety as required by law; (2) That the bill of lading did not specify the route to be traveled in Virginia; and (3) The consignee shown on the bill of lading was a person who did not have a legal right to receive such alcoholic beverages at the point of destination.

If we assume that Sections 5 and 49-a of the Act are constitutional and valid in every respect and that the Board is thereby clothed with the authority to make regulations affecting the transportation of alcoholic beverages through the State, it is, nevertheless, proper to examine and scrutinize the rules and regulations of the Board made pursuant thereto in order to ascertain whether or not the promulgation of such rules constitutes a valid exercise of the powers granted to the Board under said statutes. Such rules are unauthorized if they were not contemplated by the Legislature in the enactment of the statutes, and unless the power to make them was expressly or by necessary implication under the language of the statutes delegated to the Board they are void and invalid.

In all cases the rules and regulations may be tested in the courts to determine whether they are directed to the accomplishment of the purposes of the Statute under which they are made, and the regulations may not extend the statute or modify its provisions. (See 11 American Jurisprudence 958, and cases cited.)

In construing the language of the statutes containing delegation power to public officers or adminitsrative agencies, the general rule seems to be that the statutes are to be strictly construed against the delegation of such power and any doubtful or uncertain language must, of course, be

construed against the delegation of power. As was said in the case of *Central Union Telephone Company, et al., v. Indianapolis Telephone Company*, an Indiana case, 126 N. E. 628, "all doubtful language in statutes delegating authority will be construed in favor of the retention of such power by the Legislature."

Under these criteria let us carefully examine the language of the Alocholic Beverage Control Act as a whole in order that we may determine what regulatory powers the Legislature thereby intended to delegate to the Board, and, especially, the limitations of such power, if any were [fol. 13] intended. Let us inquire as to what kind of regulations the Legislature intended the Board to promulgate pursuant to the Act.

In the title of the Act its purpose is defined to "legalize, regulate and control the manufacture, bottling, sale, distribution, transportation, handling, advertising, possession, drinking and use of alcohol. * * *"

Section 5 provides that all regulations of the Board must be *reasonable* and *not inconsistent with the Act itself or the general laws of the State*. Section 49-a, applying specifically to regulations of transportation of alcoholic beverages, provides that the Board may make regulations "as it may deem necessary to confine such transportation to legitimate purposes". In no other section of the Act is there any provision affecting the transportation of alcoholic beverages through the State. All other sections of the Act deal with the regulation, supervision and control of the manufacture, distribution and consumption of alcoholic beverages within the State.

There can be no doubt that the Legislature intended that the transportation of alcoholic beverages through the State should be regulated and controlled insofar that such transportation might result in violations of the laws of Virginia. It was not strictly necessary to enact any statute to accomplish such purpose. The mere fact that a citizen of North Carolina or any other state is engaged in transporting whiskey or any other article from one state to another through the State of Virginia does not in any case absolve him from obeying *all* of the laws of Virginia. He must obey all speed and other traffic regulations; he cannot violate any provision of the Alcoholic Beverage Control Act as to the illegal sale, distribution, possession or consumption of alcoholic beverages while within the boundaries of

Virginia; and, in short, he has no privileges, rights or immunities other than those accorded to our own citizens. There is no language contained in the entire Act indicating any intention on the part of the Legislature to enforce the laws of North Carolina, or any other State other than those of Virginia, nor can the language of the Act be construed to intend that the time and efforts of the State Officers and employees and the State's money be expended in ascertaining what the laws of other states may be and whether or not they might be violated by a person transporting alcoholic beverages through this State before he enters the State or after he has departed from it.

The sole intention of the Legislature was obviously to guard against the violation of the Virginia law by interstate transporters of alcoholic beverages while within the bound- [fol. 14] aries of the State. They had in mind that the operators of trucks containing shipments of alcoholic beverages on their journeys through the State might violate our laws if not properly supervised and policed while within the State and to guard against such violations they attempted to delegate to the Board purely administrative functions of policing such interstate shipments. In order to facilitate such policing of these shipments while within the boundaries of the State the Legislators in the Act of 1934 empowered the Board to make rules and regulations governing the same provided such rules should *be reasonable and not inconsistent with the Act itself.* In 1936 the Legislature added to the Act Section 49-a providing that the Board might make such regulations as it might deem necessary to confine such transportation to legitimate purposes. Any rule or regulation for any other purpose than the policing of such shipments would plainly be unauthorized, because it would not be consistent "with the Act itself". The term "legitimate purposes" contained in Section 49-a could not logically be construed to mean anything other than purposes lawful under the laws of the State of Virginia.

The provisions in Section 49-a that the Board may make such regulations as it may deem "necessary" even if we assume that the delegation of power is constitutional, could not be construed to mean that there is no limitation whatever upon the power, because an attempted delegation of this nature is plainly unconstitutional. Such language must be construed in connection with Section 5 to mean that the Board may make regulations reasonably designed to police

interstate shipments while within the boundaries of the State. Any rule or regulation promulgated by the Board not so designed for such purpose would be unauthorized.

Disregarding all questions as to whether or not such rules and regulations are in violation of Article I of the Constitution of the United States as placing an undue burden upon interstate commerce let us examine the regulations in question to ascertain whether or not they were expressly or impliedly delegated and authorized by the Act.

Applying the above tests we shall deal with the Regulations in the order set forth above.

(1) The requirement of a bond *with approved surety* before a person may transport goods through the State is, so far as we know, unprecedented. To require a person to give bond conditioned upon his compliance with laws before he is permitted to engage in a lawful enterprise over which the State may have no absolute control is, to say the least, un-
[fol. 15] usual. The only purpose would be to assure his payment of a penalty in the event that he was found guilty of a violation of the law or to convince the Board of his financial responsibility. It may be that the most trustworthy and law-abiding persons would not be in a position to give the bond.

The provision that the surety must be approved places in the Board the power to arbitrarily refuse any applicant the right to transport whiskey through this State.

Can it be said that this requirement is designed purely for the purpose of policing the shipment through the State? We think not. It would seem that the purpose is to grant or refuse the right to transport alcoholic beverages through the state at the will of the Board.

We, therefore, submit that this regulation was not authorized under the Act.

(2) The requirements that the route of the shipment through the State be designated and that such route be the most direct from the consignor to the consignee seem to us to be most unreasonable and arbitrary.

To require one to anticipate the exact route he is to travel while in the State is most exacting. He might not know the condition of the roads. If he should be compelled to spend the night in Virginia could he leave the highway to go to a hotel not situated thereon? Suppose floods destroy a bridge after he has entered the State. Such a regulation would re-

quire the carrier to anticipate the condition of every road over which he must travel, and not vary therefrom under any circumstances, regardless of the exigencies which might arise whether foreseeable or not.

Had the regulation required notice to the Board or any other agency that this truck would travel over certain roads at certain times in order that the shipment might be inspected, or that the shipment be inspected and checked before it entered the State and at the time of departure, they might be deemed reasonable exercises of the rule-making power. If the load were sealed prior to entering the State and inspected on departure, or any similar regulation to insure against illegal distribution of the shipment in this State, such a regulation might be reasonable and authorized under the Act.

The rules in question are not reasonably designed to properly accomplish the design of the Legislature, but seemingly for the pure purpose of burdening the carrier with inhibitions and useless restraints on his journey through the State.

[fol. 16] (3) The third particular in which these defendants are charged with the violation of the rules of the Alcoholic Beverage Control Board is that the consignee of this whiskey in North Carolina, as shown on the bill of lading, was a person who did not have a legal right to receive such alcoholic beverage at the point of destination. It will be observed that the rules require that the consignor must have a legal right to make the shipment and the consignee must have a legal right to receive the shipment at the point of destination. In other words, that the State of Virginia will inquire into the laws of other States and if, under those laws, an illegal act has been or may be committed in those States, the State of Virginia will charge that a crime has been committed against the laws of Virginia. Counsel can hardly conceive of a situation which would more clearly demonstrate the lengths to which the Alcoholic Beverage Control Board has gone in departing from what is believed to be the true intent and purpose of the Virginia Alcoholic Beverage Control Act. If this rule be valid the changing laws of any state in the Union to which alcoholic beverages may be consigned would become an issue in the trial of one charged with transporting such beverages through Virginia. And not only would the law of the State of destination be in issue but the law of the particular community, if

there happened to be local option in that State, would be the test of the commission of a crime in Virginia. The General Assembly of Virginia passes laws to apply within the confines of the Commonwealth and for the Alcoholic Beverage Control Board to say that these defendants, who have violated no law of the State of Virginia, are guilty of a crime punishable in the Courts of Virginia because they will deliver whiskey to some person outside of the State of Virginia who is not legally authorized to receive that whiskey at the point of destination again forcibly illustrates the unsoundness of these regulations. To uphold and enforce such a regulation would require a complete abnegation of the General Assembly of Virginia from its lawful prerogative to make laws for Virginia and to surrender that prerogative to the Alcoholic Beverage Control Board who, in turn, surrender it to the Legislature of some foreign state or, forsooth, to the law-making body of some county or hamlet to which a shipment of whiskey might be destined.

It is confidently submitted that in these respects these petitioners have violated no valid law of the State of Virginia.

[fol. 17] III

Are the rules and regulations promulgated by the Alcoholic Beverage Control Board violative of Article I, Section 8, Clause 3 of the Constitution of the United States in that they impose a burden upon interstate commerce?

Counsel have been careful in the discussion hereinbefore set out to refrain from any reference to the interstate commerce feature of this case, and irrespective of the view of the Court on the matters hereinbefore presented, it is confidently submitted that the regulations which these defendants are charged with violating are unconstitutional and invalid as constituting direct burdens on interstate commerce.

The first charge is the failure of these defendants to post bond as required by the rules. This question was directly passed on by this Court in the recent case of *Williams* v. *Commonwealth*, 169 Va. 857, where the Court, speaking through Mr. Justice Gregory, said—

"The provisions of the statute (Code, Section 4675 (49a)) requiring transportation permits and the posting of a bond for interstate shipments of liquor, not to be delivered or

used in Virginia, but only passing through the State in interstate commerce, destined for some other State, constitute direct burdens upon interstate commerce and are to that extent invalid. The failure of the plaintiff in error to have a transportation permit for his shipment and his failure to post the bond required did not constitute an infraction of any valid criminal law of the Commonwealth."

It is submitted that this pronouncement of the Supreme Court of Appeals of Virginia is still the law of the Commonwealth.

The second charge against these defendants is that the bill of lading of the shipment did not specify the route to be traveled in Virginia.

This question was directly passed on by this Court in the recent case of *Surles* v. *Commonwealth*, 172 Va. 573, where the Court, speaking through Mr. Justice Holt, said—

"The Williams case holds that transportation permits and the exaction of bonds in interstate shipments are burdens which the State cannot impose. And for the same reason a designation in advance of the route to be traveled is an exercise of power forbidden to the State."

[fol. 18] It is submitted that this pronouncement of the Supreme Court of Appeals of Virginia is still the law of the Commonwealth.

There can be no doubt that had this Court in the Surles and Williams cases, both *supra*, had before it the third regulation requiring a lawful consignor and consignee, it would have held the third regulation to be invalid and unconstitutional for the same reasons given in the opinions as to the validity of the regulations there in question. Surely there can be no question that the requirements of lawful consignors and consignees outside the boundaries of Virginia would fall into the same category with the rules there considered—to constitute a regulation of or a burden upon interstate commerce.

However, we anticipate that counsel for the defendants in error will seek comfort in the recent case decided by the Supreme Court of the United States, *Duckworth* v. *State of Arkansas*, 62 S. Ct. 311, 86 L. Ed. 261, wherein the constitutionality of an Act of the Arkansas Legislature was attacked

as unconstitutional. The Act required a permit to be obtained for the transportation of intoxicating liquors through the State. The court held that the Commerce Clause of the Constitution of the United States did not preclude a State from prescribing reasonable requirements governing such a transportation in order to insure that the liquor will not be diverted to delivery or use within the State. The Supreme Court was careful to limit the application of its opinion to a permit such as it had before it, saying:

"* * * *The present requirement of a permit is not shown to be more than a means of establishing the identity of those who are engaged in the transportation,* their route and point of destination, and affords *opportunity for local officials to take appropriate measures to insure that the liquor is transported without diversion,* in conformity to the permit. * * * The Arkansas statute does not conflict with any act of Congress. *It does not forbid or preclude the transportation, or interfere with the free flow of commerce among the states beyond what is reasonably necessary to protect the local public interest in preventing unlawful distribution or use of liquor within the state.* * * *

"What we have said is restricted to the statute as applied under the regulations in force at the time of petitioner's alleged offense. It will be time enough to deal with abuses of the permit system if and when they arise. * * *" (Italics ours.)

[fol. 19] How would the United States Supreme Court have decided the Williams and Surles cases, both *supra?* Could the court have said that the requirements of a bond *with approved surety*, an unchangeable itinerary routed on the bill of lading, and, according to the determination of an administrative board, a consignor and consignee lawfully entitled to transmit and receive the shipment without the boundaries of the State, were "reasonably necessary to protect the local public interest in preventing unlawful distribution or use of liquor within the State"? We think not. We do not believe that such regulations can be so construed, and we earnestly submit that the said regulations create an unauthorized burden upon interstate commerce and if enforced against the petitioners constitute a violation of their rights under the Commerce Clause of the Constitution of the United States.

IV

Was the cancellation of the bond of Healton Miller by the Alcoholic Beverage Control Board a valid act under the power and authority conferred by the Alcoholic Beverage Control Act or the Rules and Regulations of the Board made pursuant thereto?

Assuming that the Act may have legally authorized the Board to make some kinds of rules and regulations affecting the mode and manner of transportation of interstate shipments of intoxicating liquors, there could certainly be no right conferred to act arbitrarily and without the promulgation of any rule, or regulation governing such act.

There is no express authority contained in the Act or the Regulations made by the Board authorizing it to cancel a bond once it has been properly posted and approved.

Can such power be implied from the Act or the Regulations? If so, the Board has the power to deny the right to transport liquor through this State to any person upon its whim or caprice. Any rumors which it might hear concerning a man's character or reputation might give it an excuse to cancel the bond. It would appear that the members of the Board acknowledge no limitation of the power. They could cancel the bond because of race, creed or color or any other reason. This court in *Assaid v. Roanoke, supra,* decided that such power could not be delegated by the Legislative authority even if such were the intention.

We, therefore, submit that there was no power, either express or implied, vested in the Board to cancel the bond of Healton Miller, and that at the time of petitioners' arrest [fol. 20] the bond was in full force and effect. Consequently there was no violation of the Regulations of the Board in this respect.

V

Was the cancellation of the bond a violation of petitioners' rights under the Commerce Clause of the Constitution of the United States?

It must be remembered that petitioners are not in the same position as producers, distributors and consumers of alcoholic beverages in Virginia. Their transportation of alcoholic beverages through the State is not a privilege existing as a result of a license or grant on the part of the State, but is an absolute *right* guaranteed and protected by the Constitution of the United States. Even though Vir-

ginia might prohibit the consumption or possession of liquor within its jurisdiction, yet it could not prohibit its transportation through the State.

There was no question as to the financial status of the corporate surety on the bond in this case. There was no assertion that the principal of the bond or his agents had ever violated the laws of Virginia or intended to do so in the future. The only reason given for the cancellation of the bond was that the principal had the reputation of being a bootlegger in North Carolina, and this without any hearing or notice to him.

The cancellation of the bond operated to prohibit any transportation of alcoholic beverages through the State by Healton Miller or his agents, and we submit that this act on the part of the Board violated his constitutional rights under the Commerce Clause of the Constitution of the United States.

Conclusion

It is submitted therefore that the judgment of the Trial Court was contrary to the law and the evidence and that these defendants have violated no valid law of the Commonwealth of Virginia.

Therefore, petitioners pray that a writ of error and *supersedeas* be awarded to them, that the aforesaid judgment of the Circuit Court of Rappahannock County be reversed and annulled, and that appropriate action be taken leading to the dismissal of the charges against these defendants.

[fol. 21] Notice that Counsel for Petitioners will present this petition, with the record attached, to Hon. George L. Browning, Associate Justice of the Supreme Court of Appeals of Virginia, at his office in the City of Richmond, on the 13th day of October, 1942, at two o'clock, has been given to Hon. George H. Davis, Jr., Commonwealth's Attorney for the County of Rappahannock, as evidenced by his acceptance thereof appended hereto.

In the event of a writ of error is granted, this petition will be adopted as a brief for the Plaintiffs in Error.

And Petitioners will ever pray, etc.

John Thomas Carter, Eugene Pearson Macomore,
by Counsel.

Weaver, Armstrong & Marshall, Perkins, Battle & Minor, p. q.

We, Aubrey G. Weaver and John S. Battle, the undersigned attorneys-at-law, practicing in the Supreme Court of Appeals of Virginia, do hereby certify that, in our opinion, the judgments referred to in the foregoing petition should be reviewed by the Supreme Court of Appeals of Virginia.

Aubrey G. Weaver, John S. Battle.

I hereby accept full, due and timely notice of the presentation of the foregoing petition, a true copy of which has been delivered to me, to Honorable George L. Browning, Associate Justice of the Supreme Court of Appeals of Virginia, at his office in the City of Richmond on the 13th day of October, 1942, at two o'clock P. M.

George H. Davis, Jr., Attorney for the Commonwealth for the County of Rappahannock, Virginia.

Received October 14, 1942.

G. L. B.

October 15, 1942. Writ of error and *supersedas* awarded by the Court. Bond $200.

M. B. W.

[fol. 22] APPENDIX TO PETITION

Section 5 of Alcoholic Beverage Control Act of 1936 Michie's Code—

"Section 4675 (5). *Power to make regulations; how published; effect thereof.*—(a) The board may from time to time make such reasonable regulations, not inconsistent with this act, nor the general laws of the State, as the board shall deem necessary to carry out the purposes, and provisions of this act and to prevent the illegal manufacture, bottling, sale, distribution and transportation of alcoholic beverages, or any one or more of such illegal acts and from time to time alter, repeal, or amend such regulations or any of them. Such regulations shall be published at least once in some newspaper published in the city of Richmond and in any other manner which the board may deem advisable, and upon being so published shall have the force and effect of law. The board shall certify to the clerks of all circuit courts and city courts of record having criminal jurisdic-

tion copies of all regulations adopted by the board; such clerks shall keep on file for public inspection all such regulations certified to them by the board.

"(b) Nothing in this act contained shall require such regulations to be uniform in their application.

"(c) Justices and courts shall take judicial notice of the regulations of the board made, published and filed in accordance with the provisions of this act. (*Id.*, p. 105; 1936, p. 419.)"

Section 49-a of Alcoholic Beverage Control Act of 1936 Michie's Code—

"Section 4675 (49a). *Transportation; transportation permits; penalties.*—The transportation of alcoholic beverages, other than wine and beer, purchased from persons licensed to sell same in this State, and those alcoholic beverages which may be manufactured and sold without any license under the provisions of this act, within, into or through the State of Virginia, in quantities in excess of one gallon is prohibited except in accordance with regulations adopted by the Virginia Alcoholic Beverage Control Board pursuant to this section.

"The board may adopt such regulations governing the transportation of alcoholic beverages, other than wine and beer purchased from persons licensed to sell same in this [fol. 23] State and those alcoholic beverages which may be manufactured and sold without any license under the provisions of this act within, into or through Virginia in quantities in excess of one gallon, as it may deem necessary to confine such transportation to legitimate purposes and may issue transportation permits in accordance with such regulations.

"Any person who shall transport alcoholic beverages other than wine and beer purchased from persons licensed to sell the same in this State and those alcoholic beverages which may be manufactured and sold without any license under the provisions of this act, in excess of one gallon, in violation of such regulations shall be guilty of a misdemeanor and punished as provided in section 4675(62). (1936, p. 434.)"

Regulations of Alcoholic Beverage Control Board, Section 42—

"Section 42. The Transportation of Alcoholic Beverages as Defined in the Virginia Alcoholic Beverage Control

Act, As Amended, Within, Into, or Through the State of Virginia in Quantities in Excess of One Gallon.

"Before any person shall transport any alcoholic beverages within, into or through the State of Virginia, such person shall post with the Virginia Alcoholic Beverage Control Board a bond with approved surety, payable to the Commonwealth of Virginia, in the penalty of One Thousand Dollars, upon condition that such person will not unlawfully transport and/or deliver any alcoholic beverages within, into, or through the State of Virginia, and evidence that the required bond has been posted shall accompany the alcoholic beverages at all times during transportation.

"Provided, however, that no such bond shall be required of any person licensed under the Virginia Alcoholic Beverage Control Act, as amended, to sell alcoholic beverages when such alcoholic beverages are being transported in a vehicle belonging to the licensee.

"Provided further that no such bond shall be required of any person transporting wine and/or beer purchased from persons licensed under the provisions of the Virginia Alcoholic Beverage Control Act, as amended, or those alcoholic beverages which may be manufactured and sold without any license under the Virginia Alcoholic Beverage Control Act, as amended."

[fol. 24] Regulations of Alcoholic Beverage Control Board, Section 44—

"Section 44. Where alcoholic beverages are desired to be transported within, into, or through the State of Virginia (except those instances mentioned in Sections 42 and 43 of these Regulations), such transportation shall be engaged in only when in accordance with the provisions of these regulations:

"(a) There shall accompany such alcoholic beverages at all times during transportation, a bill of lading or other memorandum of shipment, signed by the consignor showing an exact description of the alcoholic beverages being transported, the name and address of the consignor; the name and address of the consignee; the route to be traveled by such vehicle while in Virginia and such route must be the most direct route from the consignor's place of business to the place of business of the consignee.

"(b) Vehicles transporting alcoholic beverages shall not vary from the route specified in the bill of lading or other memorandum of shipment.

"(c) The name of the consignor on any such bill of lading or other memorandum of shipment shall be the name of the true consignor of the alcoholic beverages being transported, and such consignor shall only be a person who has a legal right to make such shipment. The name of the consignee on any such bill of lading or other memorandum of shipment shall be the name of the true consignee of the alcoholic beverages being transported and who has previously authorized in writing the shipment of the alcoholic beverages being transported and who has a legal right to receive such alcoholic beverages at the point of destination shown on the bill of lading or other memorandum of shipment."

[fol. 25] In Trial Justice Court of Rappahannock County

Criminal Warrant

The Commonwealth of Virginia,
County of Rappahannock, to-wit:

To Any Police Officer, Greeting:

Whereas, J. W. Dulaney, A B C Investigator has this day made complaint and information on oath before me, the undersigned, M. A. Compton, Justice for the County of Rappahannock that John Thomas Carter & Eugene Pearson Macemore, heretofore, to-wit: on the 20th day of May, 1942, within the said County of Rappahannock, did unlawfully violate the provisions of Section 49-a of the Alcoholic Beverage Control Act of Virginia, and *Section* 42 and 44 of a regulation of the Virginia Alcoholic Beverage Control Board, known as Order No. A-1, adopted August 30, 1940: In that you did transport more than one gallon of alcoholic beverages, namely: 56 cases, containing 168 gallons of whiskey, from a point in the State of Maryland, within and into the State of Virginia and in Rappahannock County, Virginia, without having posted with the Virginia Alcoholic Beverage Control Board a bond with approved surety, as required by law; and

Further, that the bill of lading or other memorandum of shipment did not specify the route to be traveled by such vehicle while in Virginia; and

Further, the consignee shown on the bill of lading or other memorandum of shipment was a person who did not have a legal right to receive such alcoholic beverages at the point of destination shown on the bill of lading or other memorandum of shipment, namely; R. M. Williard, T/A Eagle Distilling Company, Route 1, Thomasville, North Carolina, against the peace and dignity of the Commonwealth of Virginia.

These Are Therefore, in the name of the Commonwealth, to command you forthwith to apprehend and bring before the Trial Justice of the said County of Rappahannock, the said John Thomas Carter and Eugene Pearson Macemore to answer the said complaint and to be further dealt with according to law.

And you are further required to summon R. E. Wood, J. M. Lillard, J. W. Dulaney and E. C. Hoberoft to appear at [fol. 26] the same time and place and give evidence on the trial or examination of this warrant.

Given under my hand and seal this the 25 day of May, 1942.

M. A. Compton, J. P. (Seal.)

In Trial Justice Court of Rappahannock County

Judgment

The above named John Thomas Carter & Eugene Pearson Macemore were this day brought before me in the Trial Justice Court of Rappahannock County, and the above warrant was tried by me in the presence of said accused, upon their plea of not guilty, and it is my judgment that the said defendants are guilty of the within charges and I fix their punishment at a fine of Fifty Dollars and costs. Said defendants agreed to be tried jointly.

And thereupon the said accused was let on bail.

Given under my hand this the 6th day of June, 1942.

Geo. W. Settle, Trial Justice.

Order Allowing Appeal to Circuit Court

On motion of the said Defendants an appeal is allowed to them from within judgment to the Circuit Court of Rappahannock Co. and they were thereupon let to Bail.

Given under my hand this the 6th day of June, 1942.

Geo. W. Settle, Trial Justice.

In Trial Justice Court of Rappahannock County

Bail Bond

Commonwealth of Virginia,
County of Rappahannock, to-wit:

I, Geo. W. Settle, T. J. for said County of Rappk., Virginia do hereby certify that John Thomas Carter & Eugene Pearson Macemore have this day acknowledged themselves indebted to the Commonwealth of Virginia in the sum of Two Hundred Dollars ($200.00), of their respective goods and chattels, lands and tenements to be made and levied: and do hereby post in the hands of Jas. M. Settle, Clerk of Circuit Court the sum of $200.00 in cash as additional security.

Yet upon this condition that if the said John Thomas Carter & Eugene Pearson Macemore shall personally appear [fol. 27] before the Circuit Court of the County of Rappahannock, Virginia, on the 13th day of July, 1942, then and there to answer the Commonwealth concerning said charge in this warrant, and shall not depart thence without leave of said Court, then this recognizance to be void; otherwise, to remain in full force and virtue.

John T. Carter, Eugene Macemore. (Seal.)

Given under my hand and seal this 6th day of June, 1942.

Geo. W. Settle. (Seal.)

IN TRIAL JUSTICE COURT OF RAPPAHANNOCK COUNTY

COMMONWEALTH OF VIRGINIA

v.

Warrant for JOHN THOMAS CARTER, EUGENE PEARSON MACEMORE

RETURN OF SHERIFF

I executed the within warrant by arresting the within named John T. Carter & Eugene P. Macemore on the 6th day of June, 1942.

J. M. Lillard, Sheriff.

[Bill of Costs in Trial Justice Court omitted in printing.]

[fol. 28] IN THE TRIAL JUSTICE COURT OF THE COUNTY OF RAPPAHANNOCK

COMMONWEALTH OF VIRGINIA

v.

JOHN THOMAS CARTER and EUGENE PEARSON MACEMORE

ORDER FOR RETURN OF PORTION OF BAIL BOND COLLATERAL

On this 6th day of June, 1942, the above case having been heard and the bail bond for the appearance of the defendants before the Circuit Court of Rappahannock County, Virginia, on the 13th day of July, 1942, having been set in the penalty of Two Hundred Dollars ($200.00), it is ordered that J. M. Settle, Clerk of the Circuit Court of Rappahannock County, do pay over to the said defendants the sum of One Thousand Four Hundred Dollars, ($1,400), held by him as collateral for the bail bonds returnable this day, retaining the sum of Two Hundred Dollars ($200.00) as collateral for the bonds issued this day as aforesaid.

Enter:

Geo. W. Settle, Trial Justice.

In Trial Justice Court of Rappahannock County

Bail Bond

Commonwealth of Virginia,
County of Rappahannock, to-wit:

Know All Men by These Present That I John T. Carter am held and firmly bound under the Commonwealth of Virginia in the just and full sum of Eight Hundred Dollars ($800.00) to the payment whereof well and truly to be made I bind myself, my heirs and personal representatives, firmly by these presents; and as additional security for this bond do hereby post in the hands of the Clerk of the [fol. 29] Circuit Court of Rappahannock County, Virginia, the sum of Eight Hundred Dollars ($800.00) in cash, to be forfeited to the Commonwealth or returned upon the conditions hereinafter stated:

And I hereby waive the benefit of my homestead exemption as to this obligation.

Sealed with my seal and dated this 22nd day of May, 1942.

The condition of the above obligation is such that if the above bound John T. Carter shall personally appear before the Trial Justice Court of said County on the 6th day of June, 1942; as well as at any other time or times to which the proceedings in connection with the charge herein specified may be continued or further heard, then and there answer to the Commonwealth of Virginia, for and concerning a certain crime by him committed as described in the warrant hereto attached and shall not depart thence without leave of said Court, this his recognizance to remain in full force and effect until said charge shall have been finally disposed of or until it shall have been declared void by order of a Court of competent jurisdiction, then this obligation shall be void; otherwise to remain in full force and effect.

John T. Carter. (Seal.)

Signed, sealed and acknowledged by each of the above named, obligors before me, at the Clerk's Office of said County, this 22nd day of May, 1942.
Jas. M. Settle, Clerk Ct. Ct. Rapp'k. Co., Va.

IN TRIAL JUSTICE COURT OF RAPPAHANNOCK COUNTY

BAIL BOND

COMMONWEALTH OF VIRGINIA,
County of Rappahannock, to-wit:

Know all men by these *present*, that I Eugene Pearson Macemore, principal, and John T. Carter, surety, are held and firmly bound unto the Commonwealth of Virginia in the just and full sum of Eight Hundred Dollars ($800.00) to the payment whereof well and truly to be made we bind ourselves, our heirs and personal representatives, jointly and severally, firmly by these *present;* and as additional security for this bond do hereby post in the hands of the Clerk of the Circuit Court of Rappahannock County, Virginia, the sum of $800.00 cash, to be forfeited to the Commonwealth or returned upon the condition hereinafter stated. [fol. 30] And we hereby waive the benefit of our homestead exemptions as to this obligation.

Sealed with our seals and dated this 21st day of May, 1942.

The condition of the above obligation is such that if the above bound Eugene Pearson Macemore shall personally appear before the Trial Justice Court of said County on the 6th day of June, 1942, as well as at any other time or times to which the proceedings in connection with the charge herein specified may be continued or further heard, then and there answer to the Commonwealth of Virginia, for and concerning a certain crime by him committed as described in the warrant hereto attached and shall not depart thence without leave of said Court, this his recognizance to remain in full force and effect until said charge shall have been finally disposed of or until it shall have been declared void by order of a Court of competent jurisdiction, then this obligation shall be void; otherwise to remain in full force and effect.

Eugene Macemore, John T. Carter. (Seal.)

Signed, sealed and acknowledged by each of the above named obligors before me, at the Clerk's Office of said County, this 21st day of May, 1942.
B. M. Miller, Subt. T. J.

IN THE CIRCUIT COURT OF RAPPAHANNOCK COUNTY

COMMONWEALTH OF VIRGINIA

v.

JOHN THOMAS CARTER and EUGENE PEARSON MACEMORE

PLEAS OF NOT GUILTY AND WAIVER OF JURY TRIAL

On this 13th day of July, 1942, came the said John Thomas Carter and Eugene Pearson Macemore by their attorneys, and George H. Davis, Jr., who prosecutes for the Commonwealth in this behalf; and,

Whereupon said defendants by their attorneys entered their pleas of not guilty to the charges contained in the warrant issued in this case.

[fol. 31] Whereupon the said defendants by their said attorneys in open court waived trial by jury and filed a written stipulation of the facts upon which the charges in said warrant are based, which statement was subscribed by the attorneys for the defendants and for the Commonwealth and it was agreed that the same shall constitute the facts in this case.

Whereupon the Court took this case under advisement and granted leave to attorneys for both the Commonwealth and the defendants to file memorandum of authorities on the various issues involved in this case within 20 days from the date of this order.

And this case is continued.

IN THE CIRCUIT COURT OF RAPPAHANNOCK COUNTY

COMMONWEALTH OF VIRGINIA

v.

JOHN THOMAS CARTER and EUGENE PEARSON MACEMORE, Defendants

JUDGMENT—September 14, 1942

Upon An Appeal Warrant

This day came again the Commonwealth by her attorney, and came also the defendants, by counsel; whereupon the

Court being now fully advised of its opinion in this case, doth adjudge and order that each of said defendants be fined the sum of $50.00 and the costs of this prosecution; thereupon the defendants, by counsel noted an exception to the ruling of the court; it is further ordered that the bail in this case be continued in full force and effect.

IN THE CIRCUIT COURT OF RAPPAHANNOCK COUNTY

COMMONWEALTH OF VIRGINIA

v.

JOHN THOMAS CARTER and EUGENE PEARSON MACEMORE, Defendants

[fol. 32] ORDER GRANTING STAY

On this 28th day of September, 1942, came the defendants by their attorneys and moved the Court for a stay of the execution of the judgment of the Court in this case entered against the defendants on the ground that the defendants intend to apply to the Supreme Court of Appeals of Virginia for a writ of error. And came also the Commonwealth by its attorney.

There being no objections or exceptions to said motion, the same is sustained and it is ordered that execution of the judgment against the defendants entered in this case on the 14th day of September, 1942, be and the same is hereby stayed for a period of ninety days from the date of this order.

The bail bond heretofore entered into by the defendants shall continue in full force and effect and the same is continued until the further order of this court.

J. R. H. Alexander, Judge.

Seen & Approved:

George H. Davis, Jr., Commonwealth Atty.

IN THE CIRCUIT COURT OF RAPPAHANNOCK COUNTY

COMMONWEALTH OF VIRGINIA

v.

JOHN THOMAS CARTER and EUGENE THOMAS MACEMORE, Defendants

Bill of Exceptions

STIPULATION OF FACTS

Be it remembered that on the trial of this case it was stipulated between the Commonwealth and the defendants that the facts of this case were as follows:

1. On May 20, 1942, John Thomas Carter and Eugene Pearson Macemore, the two above named defendants, did receive from the Dorsey Wholesale Liquor Company, Inc., Dorsey, Maryland, who is a duly licensed wholesale establishment, at the establishment of such concern in Dorsey, [fol. 33] Maryland, fifty-six (56) cases of assorted whiskies, containing one hundred sixty-eight gallons of whiskey, for the account of R. M. Williard, Trading as Eagle Distilling Company, Route No. 1, Thomasville, North Carolina.

2. That in Maryland, this whiskey was placed upon a 1938 Ford Truck, bearing North Carolina License No. 157 B/2 237, which said truck was being jointly operated by Eugene Pearson Macemore, of Jonesville, North Carolina, and John Thomas Carter, of Thomasville, North Carolina.

3. The bill of lading showed the whiskey to have been consigned to R. M. Williard T/A Eagle Distilling Company, Route 1, Thomasville, North Carolina, but contained no routeing for the truck to follow while in Virginia.

4. That this truck left the State of Maryland and proceeded into the State of Virginia, and was in the act of passing through the State of Virginia, destined to a point in North Carolina, when apprehended in Rappahannock County, Virginia.

5. That R. M. Williard, Trading as Eagle Distilling Company, Route No. 1, Thomasville, North Carolina, who was the consignee on the bill of lading of this whiskey, according to the laws of the State of North Carolina, could not lawfully receive this shipment at its point of destination.

6. That the truck within which this whiskey was being transported was registered in the name of Healton Miller of Winston-Salem, North Carolina, who on March 26, 1942, posted a bond with approved surety, as required by law, with the Virginia Alcoholic Beverage Control Board, and the Board did on that day issue a certificate of evidence that such bond had been posted, copies of the bond and certificate being made a part hereof as Exhibits A and B respectively. That on May 1, 1942, the Virginia Alcoholic Beverage Control Board did notify Healton Miller of the cancellation of said bond and demanded the return of the certificate upon information that Healton Miller had the reputation of being a bootlegger in North Carolina, without any evidence of a violation of the laws of the State of Virginia.

7. That this whiskey was seized and turned over to the proper officer of the Court, in accordance with law, and the defendants, John Thomas Carter and Eugene Pearson Macemore were arrested and charges with the violation of the law, as set forth in the warrant.

[fol. 34] EXHIBIT "A"

COMMONWEALTH OF VIRGINIA

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

ALCOHOLIC BEVERAGE CONTROL BOARD, RICHMOND, VIRGINIA

Know all men by these presents, That I, Healton Miller, of 1035 Albert Street, Winston-Salem, North Carolina, Principal, and Hartford Accident and Indemnity Company, Surety, are held and firmly bound unto the Commonwealth of Virginia in the just and full sum of One Thousand Dollars, to the payment whereof well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents;

Whereas, the above bound principal desires to transport alcoholic beverages within, into or through the State of Virginia, in accordance with the regulations of the Virginia Alcoholic Beverage Control Board adopted pursuant to the acts of the General Assembly of Virginia;

Now therefore:

The condition of the above obligation is such that, in the event the said carrier shall engage in the transportation and/or delivery of alcoholic beverages within, into or through the State of Virginia, in a manner in conformity with the laws of the Commonwealth of Virginia, and the regulations of the Virginia Alcoholic Beverage Control Board, then the above obligation shall be null and void; otherwise, it shall remain in full force, virtue and effect.

It is understood that this bond may be cancelled by the Surety upon giving thirty days' written notice to the Virginia Alcoholic Beverage Control Board at Richmond, Virginia.

In Witness Whereof, the said Healton Miller, Principal, has signed and sealed these presents and the Surety has caused these *present* to be executed by Robert I. Boswell, [fol. 35] its duly authorized Attorney-in-Fact, this 26th day of March, 1942.

Healton Miller, Hartford Accident & Indemnity Co.
Surety. By Robert I. Boswell, Attorney-in-fact.
(Seal.)

Countersigned: Robert I. Boswell, Resident Virginia Agent.

EXHIBIT "B"

(To be posted in cab of truck)

COMMONWEALTH OF VIRGINIA

Department of Alcoholic Beverage Control
Virginia Alcoholic Beverage Control Board
Richmond, Virginia

No. 9484

EVIDENCE OF BOND.

Truck No. 1 Ford *Carrier No. 324*

This is to Certify That Healton Miller of Winston-Salem, North Carolina, has filed with this Board, bond as required under the regulations governing the transportation of alco-

holic beverages within, into or through the State of Virginia in quantities in excess of One (1) gallon.

Virginia Alcoholic Beverage Control Board. By O. W. McClure, Traffic Manager, Division of Merchandising.

Motor No. 18-444330#.
Expires: 3-26-43.

[fol. 36] (This Evidence of Bond must be returned to the Virginia Alcoholic Beverage Control Board if and whenever called for.)

Said stipulated facts are hereby made a part of the record in this case and shall be enrolled as a part of the record thereof.

MOTION TO STRIKE EVIDENCE, ETC.

Be it further remembered that after the submission of said stipulated facts the said defendants by their attorneys came in open court in the presence of the attorney for the Commonwealth and move the Court to strike out all of the evidence and to dismiss the warrant in this case on the grounds that the acts of the defendants as charged in the said warrant and set forth in said stipulation of facts do not constitute a crime against the Commonwealth because the regulations and Acts set forth in the warrant charging the defendants with violating the same are void, inoperative and of no effect in the following particulars:

1. That under the provisions of Section 5 and Section 49-a of the Alcoholic Beverage Control Act, Chapter 94 of Acts of the General Assembly of Virginia of 1934, as amended, Virginia Code Section 4675 (49-a) there was no authority delegated to make such regulations as Sections 42 and 44 of a regulation of the Virginia Alcoholic Beverage Control Board, known as Order Number A-1, adopted August 30, 1940, in that such regulations were not within the scope of the powers delegated to said Board under said Act.

2. That the cancellation of the bond of Healton Miller on May 1, 1942, by the said Board was a discriminatory action and was unlawful and without authority under the provisions of said Act and said regulations.

3. That said Act is unconstitutional insofar that it confers upon said Board the power to make said regulations, in that it violates Article III of the Constitution of Virginia in attempting to delegate to said Board purely legislative powers and functions.

4. That said Act and said regulations are unconstitutional in that they violate Article I, Section 8, clause 3 of the Constitution of the United States of regulating commerce between two States and/or imposing a burden upon interstate commerce.

5. That the cancellation of the bond of Healton Miller on May 1, 1942, by the said Board was unlawful and violative of the defendants' rights under the provisions of Article I, Section 8, Clause 3, of the Constitution of the United States. [fol. 37] And upon consideration of said motions the Court overruled and denied the same, to which ruling the defendants excepted on the aforesaid grounds stated.

MOTION FOR NEW TRIAL.

Be it further remembered that after the judgment of the court of the guilt of the accused, the defendants came in open court in the presence of the attorney for the Commonwealth and moved the court for a new trial on the identical grounds assigned for their motions to strike out all of the evidence and to dismiss the warrant as hereinbefore set forth in full and upon consideration whereof said motion was overruled and denied, to which ruling of the Court the defendants excepted.

To all of the aforesaid rulings of the court the defendants except and pray that this bill of exceptions may be signed, sealed and enrolled as a part of the record, which is done accordingly within the time prescribed by law, after it appeared in writing that the Commonwealth had been given reasonable notice of the time and place of presenting the same, this 28th day of September, 1942.

J. R. H. Alexander, Judge of the Twenty-Sixth Judicial Circuit. (Seal.)

CLERK'S CERTIFICATE

I, James M. Settle, Clerk of the Circuit Court of Rappahannock County, Virginia, do hereby certify that the foregoing is a correct copy of the record in the cause of Common-

wealth of Virginia *v.* John Thomas Carter and Eugene Pearson Macemore, Defendants, copied pursuant to the application of said defendants by counsel made to me on the 28th day of September, 1942, at two o'clock P. M. at my office in Washington, Virginia.

And I do further certify that a notice of the intention of the said defendants to apply for a transcript of the record in said cause was duly given to the Commonwealth through her Attorney, George H. Davis, Jr.

James M. Settle, Clerk of the Circuit Court of Rappahannock County, Virginia.

A Copy—Teste:

M. B. Watts, C. C.

[fol. 38] In Supreme Court of Appeals of Virginia

Present: Campbell, C. J., Hudgins, Gregory, Browning, Eggleston and Spratley, JJ.

Record No. 2668

John T. Carter and E. P. Macemore

v.

Commonwealth of Virginia

From the Circuit Court of Rappahannock County; J. R. H. Alexander, Judge.

Opinion by Justice C. Vernon Spratley—March 8, 1943

This is a companion case to *Earl Dickerson, W. O. Page, and one 1939 Ford Motor truck etc. v. the Commonwealth of Virginia*, decided this day.

The evidence in the two cases is somewhat different, but the principal assignments of error are based upon the same grounds. This case, however, has certain additional assignments of error based upon the specific offenses alleged against the appellants.

John T. Carter and E. P. Macemore were on September 14, 1942, jointly convicted of unlawfully transporting whiskey within, into and through Virginia. The specific charges against them were that the bill of lading for their

[fol. 39] whiskey shipment showed that it was being transported to a person who did not have a legal right to receive it at the point of destination shown thereon, as required by section 44 of the regulations of the A. B. C. Board of Virginia; that the bill of lading did not specify the route to be travelled by their truck in Virginia, as required by section 42 of the regulations; and that the appellants had posted no bond.

The case was tried by the court without the intervention of a jury upon an agreed stipulation of facts. The facts may be briefly stated as follows:

On May 20, 1942, the appellants received from a wholesale liquor dealer in Dorsey, Maryland, a shipment of 168 gallons of whiskey consigned to R. M. Williard at Thomasville, North Carolina. The whiskey was loaded on a truck, and immediately driven into Virginia by the appellants. Carter and Macemore said they intended to transport it through Virginia into North Carolina. They were apprehended and arrested in Rappahannock County, Virginia. They produced a bill of lading showing the correct amount of whiskey contained in the shipment, and disclosing the consignee to be a resident of North Carolina. Under the laws of North Carolina, the consignee could not lawfully [fol. 40] receive the whiskey at its destination. The bill of lading specified no route for the truck to follow while in Virginia.

The truck was registered in the name of Healton Miller, a resident of North Carolina, who had posted, on March 26, 1942, a bond as required by section 42 of the Regulations of the Virginia Alcoholic Beverage Control Board; but the Board had notified Miller on May 1, 1942, of the cancellation of the bond and demanded the return of the certificate issued thereon. The bond had been cancelled upon information that Miller had the reputation of being a bootlegger in North Carolina. There was no evidence that Miller had ever violated the laws of Virginia.

Virginia Code, 1942, (Michie) section 4675 (5) and (49a) and section 44 of the Regulations of the Virginia Alcoholic Beverage Control Board have been set out in the companion case. Section 42 of the said regulations reads as follows:

"Section 42. The Transportation of Alcoholic Beverages as Defined in the Virginia Alcoholic Beverage Control Act,

as Amended, Within, Into, or Through the State of Virginia in Quantities in Excess of One Gallon.

"Before any person shall transport any alcoholic beverages within, into, or through the State of Virginia, such [fol. 41] person shall post with the Virginia Alcoholic Beverage Control Board a bond with approved surety, payable to the Commonwealth of Virginia, in the penalty of One Thousand Dollars, upon condition that such person will not unlawfully transport and/or deliver any alcoholic beverages within, into, or through the State of Virginia, and evidence that the required bond has been posted shall accompany the alcoholic beverages at all times during transportation.

"Provided, however, that no such bond shall be required of any person licensed under the Virginia Alcoholic Beverage Control Act, as amended, to sell alcoholic beverages when such alcoholic beverages are being transported in a vehicle belonging to the licensee.

"Provided further that no such bond shall be required of any person transporting wine and/or beer purchased from persons licensed under the provisions of the Virginia Alcoholic Beverage Control Act, as amended, or those alcoholic beverages which may be manufactured and sold without any license under the Virginia Alcoholic Beverage Control Act, as amended."

It is here contended that the Virginia Alcoholic Beverage Control Act is unconstitutional, in that (1) the legisla- [fol. 42] ture did not have the power to delegate to the Alcoholic Beverage Control Board the right to adopt regulations having the force and effect of law; (2) that the Board did not have the authority to adopt sections 42 and 44 of its Regulations; (3) that the above sections are unconstitutional, in that they violate Article I, section 8, clause 3 of the Constitution of the United States by imposing a burden upon interstate commerce; and (4) that the cancellation of the bond of Healton Miller was not a valid action under the power conferred upon the Board and was violative of the rights of the appellants under the commerce clause of the Federal Constitution.

What we have said in *Earl Dickerson, W. O. Page, and one 1939 Ford truck, etc.* v. *Commonwealth, supra,* applies and controls here upon similar questions raised by the appellants.

The bond required under section 42 of the regulations is for the purpose of insuring the fitness and integrity of the carrier of the liquor. It is evidence of his responsibility and a guaranty of lawful transportation. It confines the transportation to a channel deemed trustworthy.

The requirement that the bill of lading or other memorandum of shipment shall designate the route to be travelled [fol. 43] in Virginia enables agents of the Board and the State police to inspect the shipment in transit, to keep a watch over its movements, and to discourage and prevent its unlawful delivery or distribution within the State. It is but an incident of local regulation over a subject which, if left to unrestrained movement, has a tendency to affect the public safety and welfare.

Both requirements are reasonable aids in preventing the unlawful distribution and sale of alcoholic beverages in the State. They are consistent with the provisions and purpose of the Alcoholic Beverage Control Act to regulate and control the liquor traffic and hold it within confined limits. Neither requirement forbids or precludes the lawful transportation of ardent spirits in interstate commerce. Each tends to make regulation effective.

See *Ziffrin* v. *Reeves*, 308 U. S. 132, 84 L. Ed. 128, where a State statute limiting transportation to specified common carriers was upheld, and *Duckworth* v. *Arkansas*, 314 U. S. 389, 86 L. Ed. 294, 138 A. L. R. 1144, where a statute requiring a permit for transporting liquor was declared valid.

Miller, the only person who had the right to challenge the cancellation of his bond, is not a party to this proceeding. There is no evidence that he protested the action of the Board. It does not appear from the record what connection [fol. 44] he had with the transportation of the whiskey, nor whether Carter and Macemore were his agents. We are not told whether the latter were using the truck with or without Miller's knowledge, or what action, if any, he may have taken to protect his property rights in the truck.

The bond is conditioned that the carrier will not engage in the unlawful transportation of alcoholic spirits within, into or through the State of Virginia. Evidence of its posting with the Board constituted a permit—a permit to lawfully transport. Cancelled or uncancelled, it gives no one a permit for unlawful transportation.

Whether or not the appellants might have given an acceptable bond for interstate transportation through Vir-

ginia is not an issue here. If such a bond had been given, it would have permitted lawful transportation, but it would have afforded no defense to an unlawful carriage.

The requirement for the posting of a bond is a regulation of a police nature. The Board having the authority to require the bond, under the police powers conferred upon it by the A. B. C. Act, had the right to cancel it with or without notice under the same power if, in the exercise of a [fol. 45] reasonable discretion, it was satisfied that it was being used or about to be used against the public safety and welfare.

It is not to be presumed that the authority of the Board will be arbitrarily used; but in the event that it is abused, a person feeling himself aggrieved may seek judicial relief in the courts.

In support of their contention that the regulations of the Board impose a burden upon interstate commerce, the appellants cite the recent case of *Barnett* v. *State*, — Ala. —, 9 So. (2d) 267. The Alabama court did not have before it for decision statutes or regulations involving the questions here raised. In that case, it was held that the Twenty-first Amendment to the Federal Constitution did not authorize the seizure and condemnation of liquors and transporting vehicles under existing Alabama statutes, where such liquors were being transported through Alabama to another State for disposition in violation of the laws of the latter State. In the case before us the prosecution of the appellants is based upon specific statutes of Virginia.

The judgment of the trial court is affirmed.

Affirmed.

[fol. 46] In Supreme Court of Appeals of Virginia

Record No. 2668

John Thomas Carter and Eugene Pearson Macemore, Plaintiffs in error,

against

Commonwealth of Virginia, Defendant in error

Upon a writ of error and supersedeas to a judgment rendered by the Circuit Court of Rappahannock county on the 14th day of September, 1942.

JUDGMENT—March 8, 1943

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of the judgment aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the judgment complained of. It is therefore considered that the same be affirmed, and that the plaintiffs in error pay to the Commonwealth thirty dollars damages, and also her costs by her expended about her defense herein.

Which is ordered to be certified to the said circuit court.

[fol. 47] Clerk's Certificate to record omitted in printing.

[fol. 48] IN THE SUPREME COURT OF THE UNITED STATES

JOHN THOMAS CARTER and EUGENE PEARSON MACEMORE, Appellants

versus

THE COMMONWEALTH OF VIRGINIA, Appellee

PETITON FOR APPEAL

To the Honorable, the Chief Justice of the United States and the Justices of the Supreme Court of the United States:

Your petitioners, John Thomas Carter and Eugene Pearson Macemore, respectfully represent:

1

Having been advised by the Honorable Chief Justice of the Supreme Court of Appeals of Virginia that he has adopted an invariable rule to the effect that he will refuse all applications for appeal to the Supreme Court of the United States from the final judgments or decrees of that court, the petitioners have not made application for appeal to the said Chief Justice in this case.

2

Petitioners were the appellants in a cause in the Supreme Court of Appeals of Virginia, the Court of last resort

[fol. 49] of Virginia, under the style of John Thomas Carter and Eugene Pearson Macemore versus The Commonwealth of Virginia, Record Number 2668, wherein a final judgment and opinion was rendered adversely to the petitioners on the 8th day of March, 1943.

3

The appeal in said cause was from a judgment of the Circuit Court of Rappahannock County, Virginia, imposing fines of Fifty Dollars ($50.00) and the cost of prosecution upon each of the petitioners for the violations of the provisions of Section 49-a of the Alcoholic Beverage Control Act of Virginia, (Acts of 1936 page 434, Michie's Virginia Code of 1942, Section 4675 (49-a) and Sections 42 and 44 of the Regulations of the Virginia Alcoholic Beverage Control Board, known as Order No. A-1, adopted August 30, 1940), pursuant to the powers delegated under the said Act. The Act delegated to the said Board the power to adopt regulations having the force and effect of law governing the transportation of alcoholic beverages through Virginia in quantities in excess of one gallon. These regulations provide in effect as follows:

Section 42. No person shall transport any alcoholic beverages through the State of Virginia until he shall have posted with the Board bond with approved surety in the penalty of One Thousand Dollars ($1000.00) upon condition that he will not unlawfully transport alcohol beverages through the State, and evidence of the bond shall accompany the alcoholic beverages at all times during transportation.

[fol. 50] Section 44.

(a) There shall accompany such shipments a bill of lading showing an exact description of the alcoholic beverages being transported, the name and address of the consignor and consignee, the route to be traveled by the vehicle containing the shipment while in Virginia, which route must be the most direct route from the consignor's place of business to the consignee.

(b) The vehicle transporting such beverages shall not vary from the route specified as aforesaid.

(c) The name of the consignor shall be that of the true consignor, and he shall be a person who has a legal

right to make such shipment, and the name of the consignee shall be the true consignee and the consignee must have a legal right to receive such beverages at the point of destination shown on the bill of lading.

4

That on appeal from such judgment by the petitioners to the said Supreme Court of Appeals of Virginia, such Court being the highest Court of Law and Equity in such State in which a decision of the matters in controversy could be had, the judgment appealed from was in all effects affirmed by the final judgment entered in the Supreme Court of Appeals of Virginia on the 8th day of March, 1943.

5

That there is error in the final judgment and record of proceedings in this cause in the said Supreme Court [fol. 51] of Appeals of Virginia whereby petitioners are aggrieved in that in the decision and judgment of said Court there was drawn in question the validity of a statute and regulations promulgated pursuant thereto as set forth in paragraph 2 of this petition, on the ground of their being repugnant to or in contravention of Article I, Section 8, paragraph 3 of the Constitution of the United States and the decision and judgment of the said Supreme Court of Appeals of Virginia was in favor of the validity of said statute and regulations.

Wherefore, petitioners pray for the allowance of an appeal from the aforesaid final judgment of the Supreme Court of Appeals of Virginia against the petitioners to the Supreme Court of the United States, in order that the said decision and judgment of the Supreme Court of Appeals of Virginia may be examined and reversed, and a judgment rendered in favor of petitioners and for costs and further pray that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court of Appeals of Virginia, may be sent to the Supreme Court of the United States as provided by law.

Petitioners further pray that this court may enter its order fixing the amount of the bond required for said appeal as required by law.

The errors upon which petitioners claim to be entitled to an appeal are those hereinabove indicated and which

are more fully set out in the assignment of errors filed herewith.

[fol. 52] Respectfully submitted this 25th day of May, 1943.

R. E. Joyce, John S. Battle, Aubrey G. Weaver, of Counsel for the Petitioners-Appellants.

R. E. Joyce, National Press Building, Washington, D. C.; Perkins, Battle and Minor, Charlottesville, Virginia; Weaver, Armstrong and Marshall, Front Royal, Virginia; Counsel for Petitioners-Appellants.

ORDER ALLOWING APPEAL

Appeal allowed.

Bond for $250 to be posted.

Harlan F. Stone, Chief Justice.

May 26, 1943.

[fol. 53] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS

Now come John Thomas Carter and Eugene Pearson Macemore, the appellants above named, and respectfully submit that in the record, proceedings, opinion and decree of the Supreme Court of Appeals of Virginia in the cause mentioned in the petition herewith presented there is manifest error in this, to-wit:

1

The Supreme Court of Appeals of Virginia erred in affirming the judgment of the Circuit Court of Rappahannock County, Virginia, which judgment imposed upon each of the appellants a fine of Fifty Dollars and costs.

[fol. 54]

2

The Supreme Court of Appeals of Virginia erred in holding Section 49-a of the Alcoholic Beverage Control Act of Virginia, Acts 1936, p. 434 (Michie's Virginia Code of 1942, Section 4675 (49-a)) which makes it an offense to trans-

port through the State of Virginia any alcoholic beverages in excess of one gallon, other than alcoholic beverages which may be manufactured and sold without any license under the provisions of that Act, except in accordance with regulations of the Virginia Alcoholic Beverage Control Board, to be valid as against the contention that, in so far as said statute sanctions the requirement of Regulation 44-a (Order No. A-1, August 30, 1940) prescribed by said Board, that every shipment of such alcoholic beverages through the State of Virginia must be accompanied by a bill of lading, or other memorandum of shipment, specifying the route to be traveled, which must be the most direct route from the Consignor's place of business to the consignee's place of business, the said statute is repugnant to and in conflict with Article I, Section 8, Paragraph 3, of the Constitution of the United States.

3

The Supreme Court of Appeals of Virginia erred in holding Section 49-a of the Alcoholic Beverage Control Act of Virginia, Acts 1936, p. 434 (Michie's Virginia Code of 1942, Section 4675 (49-a)) which makes it an offense to transport through the State of Virginia any alcoholic bever- [fol. 55] ages in excess of one gallon, other than alcoholic beverages which may be manufactured and sold without any license under the provisions of that Act, except in accordance with regulations of the Virginia Alcoholic Beverage Control Board, to be valid as against the contention that, in so far as said statute sanctions the requirement of Regulation 42 (Order No. A-1, August 30, 1940) prescribed by said Board, that every shipment of such alcoholic beverages through the State of Virginia shall be accompanied by a bill of lading, or other memorandum of shipment, which discloses the name of the consignee, who shall be a person who has a legal right to receive such alcoholic beverages at the point of destination shown on the bill of lading or other memorandum of shipment, the said statute is repugnant to and in conflict with Article I, Section 8, Paragraph 3, of the Constitution of the United States.

4

The Supreme Court of Appeals of Virginia erred in holding Section 49-a of the Alcoholic Beverage Control Act of

Virginia, Acts 1936, p. 434 (Michie's Virginia Code of 1942, Section 4675 (49-a)) which makes it an offense to transport through the State of Virginia any alcoholic beverages in excess of one gallon, other than alcoholic beverages which may be manufactured and sold without any license under the provisions of that Act, except in accordance with regulations of the Virginia Alcoholic Beverage Control Board, to be valid as against the contention that, [fol. 56] in so far as said statute sanctions the requirement of Regulation 44a (Order No. A-1, August 30, 1940) prescribed by said Board, that every person transporting such alcoholic beverages through the State of Virginia shall post with the Alcoholic Beverage Control Board bond with approved surety payable to the Commonwealth of Virginia in the sum of One Thousand Dollars, conditioned that such person will not unlawfully transport alcoholic beverages through the State of Virginia, the said statute is repugnant to and in conflict with Article I, Section 8, paragraph 3, of the Constitution of the United States.

5

The Supreme Court of Appeals of Virginia erred in holding Section 49-a of the Alcoholic Beverage Control Act of Virginia, Acts 1936, p. 434 (Michie's Virginia Code of 1942, Section 4675 (49-a)) which makes it an offense to transport through the State of Virginia any alcoholic beverages in excess of one gallon, other than alcoholic beverages which may be manufactured and sold without any license under the provisions of that Act, except in accordance with regulations of the Virginia Alcoholic Beverage Control Board, to be valid as against the contention that, in so far as the said statute sanctions the provisions of Regulation 42 (Order No. A-1, August 30, 1940) which authorizes said Board to cancel the bond posted by Healton Miller for the Ford Truck used by the Appellants in the transportation of the liquor alleged to be contraband upon the information that Healton Miller had the reputation of being a bootlegger in North Carolina and without evidence [fol. 57] of any violation of the laws of the State of Virginia, the said statute is repugnant to and in conflict with Article I, Section 8, Paragraph 3 of the Constitution of the United States.

6

The Supreme Court of Appeals of Virginia erred in holding that the Commonwealth of Virginia has the authority and power, by virtue of the provisions of Section 49a of the Virginia Alcoholic Beverage Control Act, Acts 1936, p. 484 (Michie's Virginia Code of 1942, Section 4675 (49a) and of Regulations 42 and 44 (Order No. A-1, August 30, 1940) promulgated by the Virginia Alcoholic Beverage Control Board pursuant to the authority of said Act, to regulate, control or unduly burden a shipment of alcoholic beverages originating in Maryland and passing through Virginia enroute to its desination in North Carolina where there is no intention to sell, dispose of or in any manner use any portion of the shipment within the State of Virginia nor any intention to violate any of the laws of Virginia. The said Act and Regulations are not reasonably designed to police the shipment or to prevent the violation of the laws of Virginia or the diversion of the said beverages into channels within the State, and hence the same are repugnant to and in conflict with Article I, Section 8, Paragraph 3 of the Constitution of the United States.

7

The Supreme Court of Appeals of Virginia erred in holding the said statute of the Commonwealth of Virginia and said regulations of the Virginia Alcoholic Beverage Control Board promulgated pursuant to the provisions [fol. 58] thereof to be valid as applied to the shipment of alcoholic beverages herein involved. This was error because the Congress of the United States has exclusive power to regulate interstate commerce, the several states having only such powers in this respect as are granted them by Congress, and the power to regulate a shipment of alcoholic beverages merely passing through the State has not been granted to the State, either by amendment to the Constitution of the United States or Act of Congress, and the exercise of the power purported to be granted under the said statute and regulations serves to create an undue burden upon interstate commerce.

For which errors the appellants above named, John Thomas Carter and Eugene Pearson Macemore, pray that said judgment of the Supreme Court of Appeals of Vir-

ginia be reversed and a judgment in favor of appellants, and for costs.

R. E. Joyce, John S. Battle, Aubrey G. Weaver, of Counsel for the Appellants. R. E. Joyce, National Press Building, Washington, D. C.; Perkins, Battle and Minor, Charlottesville, Virginia: Weaver, Armstrong and Marshall, Front Royal, Virginia, Counsel for the Appellants.

[fol. 59] Citation in usual form showing service on Abram P. Staples omitted in printing.

[fol. 60] Bond on Appeal for $250.00 approved May 26, 1943, omitted in printing.

[fol. 61] In Supreme Court of the United States

[Title omitted]

Praecipe for Record

To the Clerk of the Supreme Court of Appeals of Virginia:

An appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of Appeals of Virginia in the above case having been allowed by virtue of an order entered by the Honorable Harlan F. Stone, Chief Justice of the United States, on the 26th day of May, 1943, pursuant to the provisions of Rule 10 of the Rules of the Supreme Court of the United States you will please include the following in the record of the case to be prepared and certified by you to the Supreme Court of the United States:

[fol. 62] 1. The entire record sent up from the Circuit Court of Rappahannock County to the Supreme Court of Appeals of Virginia.

2. The opinion of the Supreme Court of Appeals of Virginia.

3. The decree of the Supreme Court of Appeals of Virginia.

4. The Petition for Appeal to the Supreme Court of the United States.

6. The Jurisdictional Statement.

7. The Assignment of Errors.

8. The Citation to the Appellee.
9. The Acknowledgment of Service by the Appellee of the documents relating to the appeal.
10. The Appeal Bond.
11. This Praecipe.

R. E. Joyce, John S. Battle, Aubrey G. Weaver, Counsel for Appellants. R. E. Joyce, National Press Building, Washington, D. C.; Perkins, Battle and Minor, Charlottesville, Virginia; Weaver, Armstrong and Marshall, Front Royal, Virginia.

[fol. 63] Receipt of a true copy of the foregoing praecipe is hereby acknowledged on this 28th day of May, 1943.

Abram P. Staples, Attorney General of Virginia.
—— ——, Assistant Attorney General of Virginia, Counsel for Appellee.

[fol. 64] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON, DESIGNATION TO PRINT ENTIRE RECORD AND ACKNOWLEDGMENT OF SERVICE THEREOF—Filed July 8, 1943

Now come the above named appellants, pursuant to Paragraph 9, of Rule 13, of the Rules of this Court, and state that the points upon which they intend to rely in this Court in this cause are as follows:

Point I

The State of Virginia has no authority to regulate or otherwise directly burden a shipment of intoxicating liquors which originated in Maryland and is merely passing through Virginia en route to its destination in North Carolina, where there is no intention to sell, dispose of, divert or in any manner use any portion of such shipment within the State of Virginia, or to violate any of the laws of Virginia.

[fol. 65] Point II

Section 4675 (49a) of Michie's Virginia Code of 1942, (Acts of the Virginia Assembly of 1936, page 419) Section 49a of the Virginia Alcoholic Beverage Control Act of

1936, as construed by the Supreme Court of Appeals of Virginia in this cause to authorize the provisions of Regulations Nos. 42 and 44 of the Virginia Alcoholic Beverage Control Board (Order No. 1A adopted August 30, 1940) which require that individuals transporting alcoholic beverages through the State of Virginia carry a bill of lading or other memorandum of shipment specifying the route to be traveled which must be the most direct route to the consignee's place of business; that such bill of lading or other memorandum of shipment disclose the name of the consignee who must be a person who has a legal right to receive such alcoholic beverages at the point of destination, and that persons transporting alcoholic beverages through the State of Virginia shall post with the Alcoholic Beverage Control Board a bond in the sum of One Thousand Dollars ($1,000.) conditioned that such persons will not unlawfully transport alcoholic beverages through the State of Virginia, is repugnant to and in conflict with Article I, Section 8, Paragraph 3 of the Constitution of the United States.

[fol. 66] Point III

Section 4675 (49a) of Michie's Virginia Code of 1942, (Acts of the Virginia Assembly of 1936, page 419) Section 49a of the Virginia Alcoholic Beverage Control Act of 1936, as construed by the Supreme Court of Appeals of Virginia in this cause to authorize the provision of Regulation No. 42 of the Virginia Alcoholic Beverage Control Board (Order No. 1A adopted August 30, 1940) pursuant to which said Board canceled the bond posted under said regulation for the Chevrolet truck which was being used for the transportation through the State of Virginia of the alcoholic beverages involved in this case solely upon the ground that it had received information that the principal on such bond had the reputation of being a bootlegger in the State of North Carolina and without any evidence of a violation of any law of the State of Virginia, is repugnant to and in conflict with Article 1, Section 8, Paragraph 3 of the Constitution of the United States.

Point IV

No State has authority to regulate or impose a direct burden upon interstate commerce unless that authority is

expressly granted by the Constitution or laws of the United States. There is no provision of the Constitution of the United States or of any Act of Congress which grants to [fol. 67] the State of Virginia the power to regulate or impose a direct burden upon a shipment of alcoholic beverages which is merely passing through Virginia en route from its point of origin in Maryland to its destination in North Carolina.

Point V

The State of Virginia has no power or authority to place any restriction upon the shipment of intoxicating liquor through that State other than is reasonably necessary to protect the local public interest against the unlawful disposition or use of such liquor within the State.

The appellants further represent that the whole of the record, as filed, is necessary for the consideration of this case, except the bond and citation upon his appeal.

R. E. Joyce, Jno. S. Battle, Aubrey G. Weaver, Counsel for Appellants. R. E. Joyce, National Press Building, Washington, D. C.; Perkins, Battle and Minor, Charlottesville, Virginia; Weaver, Armstrong and Marshall, Front Royal, Virginia.

[fol. 68] Service of the foregoing stat-ment and designation and receipt of copies thereof acknowledged this 1st day of July, 1943.

Abram P. Staples, Attorney General of Virginia, Counsel for Appellee.

[fol. 69] SUPREME COURT OF THE UNITED STATES

ORDER POSTPONING FURTHER CONSIDERATION OF THE QUESTION OF JURISDICTION—October 11, 1943

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of the jurisdiction of this Court is postponed to the hearing on the merits.

Endorsed on Cover: File No. 47627 Virginia, Supreme Court of Appeals. Term No. 134. John Thomas Carter and Eugene Pearson Macemore, Appellants, vs. The Commonwealth of Virginia. Filed July 1, 1943. Term No. 134 O. T. 1943.